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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JUSTIN ANTHONY BRIDGES, Defendant and Appellant.	2d Crim. No. B170673 (Super. Ct. No. 2002042928) (Ventura County)

Justin Bridges appeals from his conviction after a jury trial on a charge of assault with a deadly weapon or by means likely to produce great bodily injury. (Pen. Code, § 245, subd. (a)(1).)[1] He contends the court erred by failing to instruct the jury on the lesser included offense of simple assault. (§ 240.) We affirm.

FACTS

Bridges and his girlfriend, Kira Smith, were drinking at a bar. The victim, John Marin, started talking with Smith who tried to introduce him to Bridges, but Bridges would not look at him.

Later, Marin saw Smith and Bridges arguing at the bar. Smith walked towards the bathroom with another man, but Bridges seemed unconcerned about this.

[1] All statutory references are to the Penal Code unless otherwise stated.

Marin, however, approached the other man to ask whether he knew Smith. The man replied he did not and Marin asked Smith if she needed help. Smith told him she needed to go to the bathroom, and Marin asked Abby McKowan, the bartender, to assist her. Bridges left the bar.

Bridges knocked on the back door of the bar after the women emerged from the bathroom. At the time, Marin was facing away from the back door and looking at Smith. McKowan opened the back door for Bridges.

Suddenly, Marin heard someone running towards him and felt a blow to his head. Bridges testified that he hit Marin once in the head with a bar glass, and it shattered into little pieces. McKowan screamed, "Justin, Justin, what are you doing?" But, McKowan testified she saw Bridges continue to hit Marin on the head three more times with the glass, causing blood to spurt from his head. Marin testified that he heard the sound of shattering glass, and he saw and felt blood gushing from his head wounds. Marin testified that he feared for his life.

Marin blocked Bridges' final attempt to attack him. He then head-butted Bridges and stuck his thumb in Bridges' eye. Bridges asked him to stop and screamed for help. Bridges ran from the bar with Marin in pursuit. Once outside, Marin picked up Bridges, threw him down the stairs, kicked him in the leg, kneed him in the face and placed appellant in a headlock.[2]

Bridges ran away when Marin released him. Marin walked to a nearby hospital with a friend. Marin lost two units of blood as a result of these injuries.

DISCUSSION

Appellant claims the court committed reversible error by failing to instruct the jury, sua sponte, on simple assault, which is a lesser included offense of the charged offense. (§ 240; *People v. Baker* (1999) 74 Cal.App.4th 243, 251; *People v. Babich* (1993) 14 Cal.App.4th 801, 804.) A trial court must instruct the jury, sua sponte, on such

[2] Marin is about five feet eight inches tall and weighed approximately 190 pounds at the time; appellant is about five feet six inches and weighed about 160 pounds.

an uncharged, lesser included offense if there is substantial evidence absolving the defendant of the greater offense but not of the lesser. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.) There is no duty to instruct on a lesser included offense when there is no evidence that the offense was factually less than that charged. (*People v. Breverman* (1998) 19 Cal.4th 142, 154-155.) Even if there is error in failing to instruct on a lesser offense, we may not reverse unless there is a reasonable likelihood that, absent the error, the defendant would have obtained a more favorable result. (*Id*., at pp. 165, 178.)

Section 245, subdivision (a)(1) provides, in pertinent part, "[a]ny person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished by imprisonment . . . ." Simple assault requires only "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240; *People v. Williams* (2001) 26 Cal.4th 779, 782.)

Whether an assault is aggravated or not depends upon whether the defendant employs a deadly weapon or instrument, other than a firearm, or a weapon, instrument, object or force that is not necessarily deadly, but which is used in such a manner that it is capable of producing great bodily injury. (See generally *People v. Aguilar* (1997) 16 Cal.4th 1023.) Although the victim's injury must be significant, no permanent or protracted impairment, disfigurement, or loss of function is required to be convicted under section 245, subdivision (a)(1). (*People v. Beasley* (2003) 105 Cal.App.4th 1078, 1087-1088.)

Some weapons, other than firearms, are deemed inherently deadly as a matter of law. (*People v. Aguilar, supra,* 16 Cal.4th at p. 1029 [mentioning dirks and blackjacks].) But other weapons, instruments, or objects will be deemed deadly or capable of producing great bodily injury depending on how they are used. (*Id*., at pp. 1035-1037.) In determining whether an object can produce great bodily injury, the trier of fact looks to the nature of the object, the manner of its use, the location on the body where it is directed and the injuries inflicted. (*People v. Herd* (1963) 220 Cal.App.2d 847, 850; see *Aguilar*, *supra*, at p. 1038 (conc. opn. of Mosk, J.), *id*., at pp. 1037-1038;

People v. Beasley, *supra*, 105 Cal.App.4th at pp. 1087-1088 [striking of broomstick on arms or shoulders established simple assault as distinguished from striking head or face].)

Repeatedly striking someone on the head with a bar glass so as to cause blood to spurt profusely from the resulting wound falls within the conduct proscribed by section 245, subdivision (a)(1). (See *People v. Martinez* (1977) 75 Cal.App.3d 859, 862-863, fn. 1 [throwing beer bottle which bounced off police car and shattered against officer's elbow unquestionably constitutes assault with deadly weapon]; cf. *People v. Rupert* (1971) 20 Cal.App.3d 961, 968 [unclear whether fist or coffee pot used to knock victim to floor, causing several cuts to head and face – reversed for failure to instruct that simple assault was lesser included offense of aggravated assault].) Appellant admitted he broke the glass on Marin's head causing blood to spurt. Accordingly, his defense was not that he did not commit the offense or that it was minor; his defense was that he smashed the glass on Marin's head in self-defense.

Assuming, arguendo, that it was error not to give instructions on simple assault, the error was harmless. It is not reasonably probable that the jury would have convicted him of simple assault if the court had given an instruction explaining that simple assault is a lesser included offense of assault with a deadly weapon. (*People v. Lee* (1999) 20 Cal.4th 47, 62; *People v. Breverman, supra*, 19 Cal.4th at p. 177.)

Accordingly, the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Kevin J. McGee, Judge

Superior Court County of Ventura

Wayne C. Tobin, under appointment by the Court of Appeal, for Defendant and Appellant.

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